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6 UNITED STATES DISTRICT COURT
7 NORTHERN DISTRICT OF CALIFORNIA
8 SAN FRANCISCO DIVISION
9

10 THE UNITED STATES OF AMERICA,)

11 Plaintiff,)

12 vs.)

13 PETER LASELL)

Defendant.)
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No. CR 07-0716-MHP

**DEFENDANT PETER LASELL'S
SENTENCING MEMORANDUM**

Date: AUGUST 11, 2008

Time: 9:00 a.m.

TABLE OF CONTENTS

I.	THE POST-BOOKER SENTENCING FRAMEWORK	3
II.	FACTUAL RECITATIONS CONTAINED IN THE PRESENTENCE REPORT	4
III.	APPLICATION OF THE GUIDELINES TO THE FACTS OF THIS CASE	5
	A. INTRODUCTION	5
	B. THE COURT'S AUTHORITY TO DEPART FROM THE GUIDELINE RANGE	5
IV.	MITIGATING FACTORS WHICH THE COURT SHOULD CONSIDER INDETERMINING A REASONABLE SENTENCE PURSUANT TO 18 U.S.C. 3553(a)	6
	A. INTRODUCTION	6
	B. PETER LASELL'S EARLY ACCEPTANCE OF RESPONSIBILITY AND DISPLAY OF REMORSE	7
	C. PETER LASELL'S EMPLOYMENT RECORD	7
	D. PETER LASELL'S AGE AND UPBRINGING	8
	E. PETER LASELL'S FAMILY TIES AND RESPONSIBILITIES	8
	F. PETER LASELL'S FINANCIAL RESPONSIBILITY	8
V.	DEFENDANT PETER LASELL'S REQUESTS OF THE COURT	9
	1. Delayed Self-Surrender with Court review.....	9
	2. Self Surrender after January 1, 2009	9
	3. Judicial Recommendation for Local Facility	9
	4. Imposition of Below Guidleline Fine Amount	13
VI.	THE RECOMMENDATION CONTAINED IN THE PRESENTENCE REPORT	15
VII.	CONCLUSION	15

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Koon v. United States</i> , 518 U.S. 81, 92 (1996)	5, 6
<i>Raytheon Co. V. Hernandez</i> , 540 U.S. 44, 49 n.3 (2003)	5
<i>Rita v. United States</i> , ___ U.S. ___, 168 L. Ed. 2 nd 203, 127 S. Ct. 2456 (June 21, 2007)	4
<i>United States v. Ameline</i> , 409 F.3d 1073 (9 th Cir. 2005)	6, 7
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	3, 4
<i>United States v. Cantrell</i> , 433 F.3d 1269 (9 th Cir. 2006)	4
<i>United States v. Evans-Martinez</i> , 448 F.3d 1163 (9 th Cir. 2006)	3
<i>United States v. Fagan</i> , 158 F.3d 1280(10 th Cir. 1998)	7
<i>United States v. Jaroszenko</i> , 92 F.3d 486 (7 th Cir. 1996)	7
<i>United States v. Kimbrew</i> , 406 F.3d 1149 (9 th Cir. 2005)	4
<i>United States v. Marial-Santiago</i> , 447 F.3d 715, 719 (9 th Cir. 2006)	4
<i>United States v. Menyweather</i> , 431 F.3d 692 (9 th Cir. 2005)	3
<i>United States v. Mix</i> , 457 F3d 906, 911 (9 th Cir. 2006)	4

FEDERAL STATUTES

18 U.S.C. § 3553(a)	4
18 U.S.C. § 3561(a)	1, 6

1 court finds reasons to support an out-of-Guidelines sentence. Courts now have the discretion to
2 impose non-Guidelines sentences. *United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006) See
3 18 U.S.C. 3553(a)(4); *Booker*, 543 U.S. 245-46 (the statute permits the court to tailor the sentence in
4 light of other statutory concerns as well.)

5 Consistent with *Booker*, the Ninth Circuit follows a two-step procedure for reviewing
6 sentences imposed following the date the Supreme Court issued its opinion in *Booker*. *United States*
7 *v. Mix*, 457 F.3d 906, 911 (9th Cir. 2006); *Cantrell*, 433 F.3d at 1279-81. First, the appellate court
8 determines whether the district court properly considered and applied the applicable Sentencing
9 Guidelines. *Cantrell*, 433 F.3d at 1279-81. Second, the Court of Appeals reviews the sentence for
10 reasonableness in light of the factors set forth in 18 U.S.C. 3553(a). *Cantrell*, 433 F.3d at 1280.

11 In sentencing defendants' post-*Booker*, this Court must first consult the Guidelines and
12 determine the correct guideline range, and then must consider the 3553(a) factors relating to this
13 particular case and the arguments of counsel, and decide whether the 3553(a) factors call for a
14 sentence within or outside of the Guidelines. *Cantrell*, 433 F.3d at 1279; *United States v. Kimbrew*,
15 406 F.3d 1149, 1152 (9th Cir. 2005). If the Court decides that a below-Guidelines sentence is
16 appropriate, then it must set forth enough of its reasoning to satisfy the appellate court that [the
17 district court] has considered the parties' arguments and has a reasoned basis for exercising [its] own
18 legal decision making authority. *Rita v. United States*, __ U.S. __, 168 L. Ed. 2nd 203, 127 S. Ct. 2456
19 (June 21, 2007). See *United States v. Marial-Santiago*, 447 F.3d 715, 719 (9th Cir. 2006) (affirming a
20 sentence as reasonable where the district court gave thoughtful attention to factors recognized in
21 3553(a) and exercised sound discretion.)

22 ***II. FACTUAL RECITATIONS CONTAINED IN THE PRESENTENCE REPORT***

23 Defendant Peter Lasell does not object to the factual "Offense Conduct" provided by the
24 Probation Department in the "Presentence Investigation Report."
25

III. APPLICATION OF THE GUIDELINES TO THE FACTS OF THIS CASE

A. INTRODUCTION

Defendant Peter Lasell has no objection to the calculation of his prior record score as calculated by the Probation Officer in the Pre-Sentence Report. Likewise, as stated in the Rule 11(c)(1)(C) Plea Agreement, the Guideline Range is correctly calculated at Offense Level 28 and Criminal History score of 0, for a recommendation of 78-97 months. The Plea Agreement also states that the parties agree to a (48) months imprisonment disposition.

However, the Plea Agreement did not bind this Court as to a surrender date, a fine amount, or any of the other requests from the defense. Likewise, the Guidelines do not ultimately control the Court's selection of a surrender date or a fine amount.

B. THE COURT'S AUTHORITY TO DEPART FROM THE GUIDELINE RANGE.

Congress allows district courts to depart from the applicable Guidelines range if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *Koon v. United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)).

In determining whether the Commission has adequately taken a factor into consideration, "Congress instructed courts to 'consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.'" *Id.* at 92-93 (quoting 18 U.S.C. 3553(b)). Four types of factors are relevant to departures: forbidden factors; encouraged factors; discouraged factors; and unmentioned factors. *See id.* at 93-96. Forbidden factors include race, sex, national origin, creed, religion, socioeconomic status, lack of guidance as a youth, drug or alcohol dependence, and economic hardship. *Id.* With the exception of the forbidden factors, the Commission "does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines that could

1 constitute grounds for departure in an unusual case." *Id.* at 93. Encouraged factors are ones that "the
2 Commission has not been able to take into account fully in formulating the guidelines." *Id.* at 94.
3 Discouraged factors, on the other hand, are "not ordinarily relevant to the determination of whether a
4 sentence should be outside the applicable guideline range." *Id.* at 95. In *Koon, supra*, the Supreme
5 Court outlined the sentencing court's authority to consider each of these types of factors in deciding
6 whether to depart:

7 If the special factor is a forbidden factor, the sentencing court cannot use it as a
8 basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the
9 applicable Guideline does not already take it into account. If the special factor is a discouraged factor,
10 or an encouraged factor already taken into account by the applicable Guideline, the court should
11 depart only if the factor is present to an exceptional degree or in some other way makes the case
12 different from the ordinary case where the factor is present. *Id.* at 95-96.

13 If the factor does not fall into any of the above categories, it is considered unmentioned by the
14 Guidelines. In *Koon*, the Supreme Court stated that if the factor is unmentioned, "the sentencing court
15 must determine whether the factor, as occurring in the particular circumstances, takes the case outside
16 the heartland of the applicable Guideline." 116 S. Ct. at 2051. To make this determination, the court
17 must consider "the structure and theory of both relevant individual guidelines and the Guidelines
18 taken as a whole," *Id.* at 2045.

19 ***IV. MITIGATING FACTORS WHICH THE COURT SHOULD CONSIDER IN***
20 ***DETERMINING A REASONABLE SENTENCE PURSUANT TO 18 U.S.C. § 3553(a)***

21 **A. INTRODUCTION**

22 In *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc) Wardlaw, J., concurring in
23 part and dissenting in part) the court pointed out that "District Courts now . . . have the discretion to
24 weigh a multitude of mitigating and aggravating factors that existed at the time of mandatory
25 Guidelines sentencing, but were deemed not ordinarily relevant, such as age, education, and
vocational skills, mental and emotional conditions, employment record, family ties and

responsibilities.” *Id.* at 1093. In the instant case there are a number of factors which individually and taken as a whole mitigate in favor of the defense requests.

B. PETER LASELL’S EARLY ACCEPTANCE OF RESPONSIBILITY AND DISPLAY OF REMORSE.

Peter Lasell has accepted responsibility at an early stage of the proceedings and cooperated with the authorities by providing a statement and information that incriminated him. Mr. Lasell cooperated with the Federal Agents at the time of the execution of the search warrant, including providing coded passwords to allow easier access to his entire hard drive. Further, prior to even an arraignment, Mr. Lasell provided a proffered statement to law enforcement. As a result if his computer, password, and statement, federal agents have initiated several criminal investigations. The defense has confirmed at least on international investigation and probable arrest for a Google Hello user – “purplemonkeydish.” Peter Lasell has shown acceptance of responsibility and displayed that with his letter to the Probation Department.

Pre-Booker cases have recognized that “exceptional remorse” could form the basis for a downward departure from the Guidelines range even though a defendant has already received an adjustment for acceptance of responsibility. *United States v. Fagan*, 158 F.3d 1280, 1284-85 (10th Cir. 1998); *United States v. Jaroszenko*, 92 F.3d 486 (7th Cir. 1996). Obviously, extreme remorse is also a factor which can be considered in fashioning an appropriate sentence pursuant to 18 U.S.C. 3553(a). As the Presentence Report indicates, Mr. Lasell wrote “It is my expectation that I will carry the personal guilt for this for the rest of my life.”

C. PETER LASELL’S EMPLOYMENT RECORD

Peter Lasell has been employed in the pharmacy trade since 1975. He had an initial internship at Marshall Hale Hospital, San Francisco from 1975-1978, and proceeded with a career as a pharmacist until his disability ended his career in May, 2007. Mr. Lasell also taught as a professor at the University of the Pacific from 1982 to 1984.

1 **D. PETER LASELL'S AGE AND UPBRINGING**

2 Mr. Lasell is 57 years old, with a wife, Susan, and one son, Joshua. He was raised in Martinez,
3 CA with his two siblings, Curtis and Carol Ann. Ms. Bernice Lasell is still alive and remains in
4 Martinez. His brother died prematurely in 2005 from liver disease, which apparently caused some
5 strong emotional turmoil with Mr. Lasell and contributed greatly to his depression. Mr. Lasell has
6 been well educated and remained a vital member of society until his current criminal problems.

7 **E. FAMILY TIES AND RESPONSIBILITIES**

8 Mr. Lasell remains married to Susan Lasell, and living with their son, Joshua in Belmont, CA.
9 His disability and conditions of pretrial release have prevented him from continuing any significant
10 community relationships, but his ties to the Belmont community is very strong from his more than
11 twenty year residence in the same home. The defense has included some character letters showing
12 his ties to the community, written by family and friends. **[EXHIBIT A]**. Susan Lasell has assumed
13 all of the financial responsibilities, in particular the income generating responsibilities since Mr.
14 Lasell has been on disability for over a year. Also, Susan Lasell handles most of the family
15 responsibilities because of Mr. Lasell's physical limitations.

16 **E. FINANCIAL RESPONSIBILITY**

17 Peter and Susan Lasell have shown extreme financial responsibility over the past 20 years. In this
18 day and age of credit cards, debt, irresponsible house purchases, and over extended mortgages, the
19 Lasell family's financial status has remained steady and extremely conservative. The couple has
20 diligently preserved any extra wealth in retirement accounts, and painstakingly paid the balances on
21 any credit cards within the same month. They only possess two vehicles, a 1995 Volvo and a 1992
22 Ford van, and their monthly living expenses show very little frivolous expenses. They have remained
23 in the same home and delayed any renovations for over twenty years. Prior the current situation, the
24 family was on the edge of enjoying the benefits of all their years of financial planning. Their son is a
25 year from college – perhaps the final large financial responsibility for the family – and both are

1 nearing the age of 60. Susan Lasell now faces several years of depleting retirement accounts, college
2 tuition and living expenses without assistance.

3 ***V. DEFENDANT PETER LASELL'S REQUESTS OF THE COURT AT THE TIME***
4 ***OF SENTENCING***

5 **1. Delayed Self- Surrender with a Court review in three month intervals**

6 **2. "Self- Surrender" on a date after January 1, 2009.**

7 **3. This Court's Judicial Recommendation for a local federal medical facility.**

8 18 U.S.C. § 3145(c) provides the two criteria necessary for a self surrender in this case.

9 1) proof by clear and convincing evidence that he is neither a flight risk nor a danger to the
10 community; and

11 2) it is clearly shown that there are exceptional reasons why such a person's detention would
12 not be appropriate."

13 There is significant evidence of both factors to justify a self-surrender in this case. The
14 defense would respectfully suggest that both the probation department and the prosecution would
15 agree on most of the factors.

16 **Background and Medical Condition**

17 Peter Lasell is a 57 year-old man with absolutely no criminal history until the present offense.
18 He attended pharmaceutical school, where he met his wife, Susan to whom he married in 1979. Peter
19 and Susan Lasell have one son, Joshua, who is about to enter his final year of High School with plans
20 to attend college. Since his marriage in 1979, Peter Lasell has shown to be a prudent, well educated
21 and thrifty husband and father, until his health abandoned him in over the past five years.

22 Peter Lasell suffers from a number of health conditions, stemming most seriously from back
23 surgery in 2005. Currently, he is forced to be bed ridden for nearly twenty hours per day with both
24 back pain and chronic migraine headaches. As listed in the Probation Report, Mr. Lasell suffers from
25 the following ailments:

- glaucoma in both eyes

- 1 - hypertension
- 2 - chronic migraine headaches
- 3 - lumbar radiculopathy
- 4 - spinal stenosis
- 5 - hyperlipidemia
- 6 - GI reflux
- 7 - Numbness in both feet
- 8 - Rosacea
- 9 - Right foot drop secondary to knee surgery

10 Since 2005, as a result of both depression and his back deterioration, Mr. Lasell has been
11 under constant supervision of several members of the Kaiser staff, including psychologists,
12 psychiatrists, medical doctors, and surgeons. On a monthly basis, Peter Lasell has his medications re-
13 evaluated in an attempt to determine a "mix" that will address his severe pain and depression.

14 At the time of the probation interview, Mr. Lasell was taking the following prescriptions:

- 15 - Neurontin (300 mg QHS)
- 16 - Lipoderm (5% patches 2xQD)
- 17 - Oxycodone (10mg 4xQ8H)
- 18 - Oxycodone (5mg 1-2xQ6H)
- 19 - Diazepam (10mg 1-2xBID)
- 20 - Fluoxetine (20mg 4xQAM)
- 21 - Strattera (10mg 1xQAM)
- 22 - Prilosec (20mg 1xBID)
- 23 - Xalatan (.005% 1xBID)
- 24 - Pepcid (20mg 1xBID)
- 25 - Simvastatin (40mg 1xQPM)

- 1 - Atenolol (50mg 1xBID)
- 2 - Cozaar (100mg 1xBID)
- 3 - Metrogel (1xBID)

4 Mr. Lasell also takes the following over the counter medications:

- 5 - Oscal 500
- 6 - Vitamins
- 7 - Aspirin
- 8 - Afrin Nasal Spray
- 9 - Sudafed

10 Over the past four weeks, Mr. Lasell's doctors have again adjusted his medications in an
11 attempt to control his physical pain and mental depression.

12 According to the Preliminary Probation Report, there was an absence of medical records at
13 the time of the drafting of the report. It is the defense's understanding from a conversation with
14 Probation Officer Sharpe that records have been provided in the interim and will be attached to the
15 Final Probation Report. The defense has also provided the attached reports dated 10/17/07, 1/12/05,
16 and 11/16/04. **[EXHIBIT B]**. These reports confirm Mr. Lasell's physical and mental deterioration
17 PRIOR to his current criminal problems.

18 Likewise, the defense has also provided letters from two of his doctors – Dr. Hou and Dr.
19 Wilson – to show his current treatment and the risk of immediate and un-prepared entry into a
20 custodial environment. [Dr. Hou's letter was provided to the Probation Officer and is attached to her
21 report, while Dr. Wilson's is attached here as **EXHIBIT C**].

22 Dr. Hou writes, "[H]is regime of medications includes relatively large amounts of narcotics
23 which have been adjusted by the Chronic Pain Program at Kaiser South San Francisco." Dr. Hou
24 states the effect of even a slight change in his medications due to confinement is "[F]irst his
25 depression would worsen from inadequate psychiatric management and increased pain, both from

1 migraines and chronic pain.” “Second, he would be at risk if assaulted or if unable to maintain
2 suitable body positions given the degree of radiculopathy and spinal stenosis... this would require
3 surgical intervention that would have been preventable in the first place. Dr. Hou opines that
4 “aggravation or re-injury to his back could possibly result in near or complete paralysis of either or
5 both legs.” Finally, Dr. Hou questions whether basic daily functions could be performed by Mr.
6 Lasell such as dressing, bathing, or eating.

7 The defense also proactively secured the assistance of Dr. Douglas Korpi, Ph.D., for a
8 psychological evaluation to address Mr. Lasell’s psychopathology, amenability to treatment, and risk
9 of re-offense. Dr. Korpi is a preeminent expert in the State of California and is regularly called upon
10 by the California Department of Mental Health for psychological evaluations as a basis for
11 commitment under the California Sexually Violent Predator Act, and subsequent testimony as an
12 expert in California Superior Court. [Dr. Korpi’s report has been attached to the Probation Report].

13 The defense will not repeat Dr. Korpi’s entire report. However, Dr. Korpi very thoroughly
14 evaluates Mr. Lasell for any psychopathology, his amenability to treatment and his risk of recidivism.
15 Ultimately, Dr. Korpi concludes that “when we put this all together, what we see before us is a well
16 socialized pharmacist who is not in the least bit antisocial, not in the least bit criminologic, and not at
17 all prone to sexual re-offense as it relates to the ongoing factors in his life.”

18 The Assistant U.S. Attorney urges this Court to take Mr. Lasell into custody immediately.
19 The argument will assumably be the same as argued at the time of the entry of the plea: the
20 seriousness of the offense, the high risk of flight or suicide, and the need for safety of the community.
21 All of these concerns are clearly valid. However, in the case of Mr. Lasell, the value of the
22 mitigating factors overwhelmingly outweighs the justifications for immediate custody.

23 First, Federal agents searched Mr. Lasell’s home on July 31, 2007. Mr. Lasell obviously
24 knew on July 31st that he faced severe criminal consequences. In September of 2007, counsel for Mr.
25 Lasell met with AUSA Danner to view some of the images and discuss a proffer agreement. On

1 October 26, 2007, Mr. Lasell and counsel for both the Government and the defense met to provide a
2 proffered statement with a signed proffer agreement. It was very clear after that meeting that Mr.
3 Lasell would be facing federal criminal charges. On November 19, 2007, Mr. Lasell was arraigned in
4 the United States District Court on charges of transportation and possession of child pornography.
5 Mr. Lasell has remained released on home detention since November 19th. Mr. Lasell has remained
6 trouble-free while on pretrial release and has the support of Anthony Granados of Probation Pretrial
7 Services.

8 Secondly, Mr. Lasell entered his plea on May 5, 2008 with a plea agreement pursuant to Rule
9 11(c)(1)(C) of the Federal Rules of Criminal Procedure. Mr. Lasell agreed to a four year term of
10 imprisonment, and has been released with that four year term pending for the past three months
11 without incident.

12 Third, it is in the best interest of the Bureau of Prisons to have advanced notice of his medical
13 and psychological history, his prescriptions and course of medications, and thereby develop a
14 treatment plan in advance of his surrender. Certainly, if Mr. Lasell can be delivered to Federal
15 custody with a determined treatment plan it would drastically reduce the risk of physical harm or
16 mental deterioration. The risk of re-offense or self harm is drastically lower if allowed to self-
17 surrender than the risk of harm if simply "deposited" into federal custody on the day of sentencing.

18 Finally, the Court should be aware that Mr. Lasell's medical and psychological struggles
19 PRE-DATE his criminal conduct. The medical reports and his own history indicate that his back
20 surgery, unemployment from his disability and migraine pain was being treated years before his
21 possession of any illegal or inappropriate materials. This mitigation is NOT simply an excuse to
22 avoid punishment.

23 **4. Imposition of a fine below the Guideline Range**

24 USSG section 5E1.2 provides the Fines for Individual Defendants. Section 5E1.2(c) defines
25 the minimum and maximum fine amounts for an Offense Level of 28 as \$12,500.00 and \$125,000.00,

1 respectively. However, as this is aware, in the post-Booker era, the Guidelines are merely advisory.
2 Section 5E1.2(d) states that the Court shall consider the following factors in the determining the
3 amount of a fine:

- 4 1) the need for the combined sentence to reflect the seriousness of the offense
5 (including the harm or loss to the victim and the gain to the defendant), to promote
6 respect for the law, to provide just punishment and to afford adequate deterrence;
- 7 2) any evidence presented as to the defendant's ability to pay the fine (including the
8 ability to pay over a period of time) *in light of his earning capacity and financial*
9 *resources;*
- 10 3) *the burden that the fine places on the defendant and his dependants relative to the*
11 *alternative punishment;*
- 12 4) any restitution or reparation that the defendant has made or is obligated to make;
- 13 5) *any collateral consequences of conviction, including civil obligations arising from*
14 *the defendant's conduct;*
- 15 6) whether the defendant previously has been fined for a similar offense;
- 16 7) the expected costs to the government of any term of probation, or term of
17 imprisonment and terms of supervised release imposed; and
- 18 8) *any other pertinent equitable considerations.*

19 The defense respectfully asks this Court to not punish the Lasell family financially for their
20 extensive, sound, conservative financial planning over the past thirty years. The Guidelines include
21 "the ability to pay" as a factor for consideration. However, it seems unjust that someone who lives
22 within their means for an extended amount of time and dutifully saves towards retirement would be
23 penalized for such efforts. Meanwhile, someone who spends without prohibition and places him and
24 his family in dire financial straits would benefit from such careless actions. Mr. Lasell will be
25

1 punished with four years in federal custody. All the punitive and deterrent factors of a criminal
2 sentence will be served with the imprisonment. A fine would be unjust.

3 **VI. THE RECOMMENDATION CONTAINED IN THE PRESENTENCE REPORT**

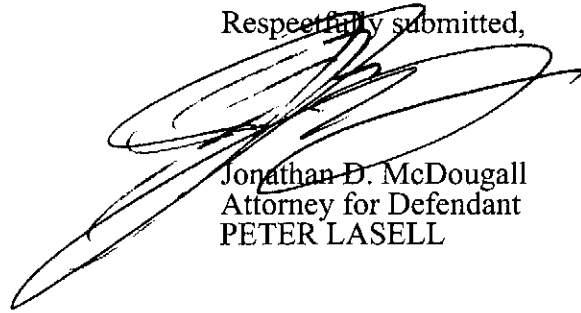
4
5 The Probation Report and Recommendation indicates a sentence and below the Guidelines range.
6 Despite the severity of the offense, the impact on the victims, the number of images, and the
7 allegations of transport of the pornographic images, the recommendation is for a below the minimum
8 range. Ms. Sharpe finds that Mr. Lasell clearly indicates remorse and acceptance of responsibility,
9 and has taken immediate steps to address his offense and any chance of recidivism. Ms. Sharpe
10 further states that "the defendant is viewed as a good candidate for voluntary surrender". The
11 defendant has kept all court appearances, complied with the conditions of pretrial release and is not
12 viewed as a flight risk or a danger to the community." The Probation report accurately reflects that
13 the 48 month sentence and five year release supervision would adequately address all the sentencing
14 concerns.

15 **VII. CONCLUSION**

16 Based on the foregoing, it is respectfully submitted that this Court adhere to the Plea Agreement
17 disposition of 48 months of imprisonment and five years of supervised release. Further, the
18 defendant respectfully asks this Court to allow him to self surrender at a future date and specified
19 location. The defense would ask this Court to allow the medical staff that has been diligently treating
20 Mr. Lasell more time to develop a treatment plan that would allow a safe incarceration and service of
21 his 48 months. In the alternative, the defendant respectfully asks this Court to allow a self-surrender
22 at a future date to allow for adequate preparation by the Bureau of Prisons. Finally, the defense seeks
23 a minimal fine below the \$12,500.00 suggested by the Probation Department and indicated by the
24 Guidelines.
25

1 Dated: August 4, 2008

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Jonathan D. McDougall', is written over the typed name and title.

Jonathan D. McDougall
Attorney for Defendant
PETER LASELL